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IN THE

Supreme Court of the United States

October Term, 1951

No.

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a corporation, *Petitioner*,

v.

THOMAS M. BROOKS, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Richmond, Fredericksburg and Potomac Railroad Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on May 15, 1952.

OPINIONS AND JUDGMENT BELOW.

The majority opinion of the Court of Appeals by Judge Fahy, the concurring opinion of Judge Edgerton and the dissenting opinion of Judge Proctor have not yet been re-

ported, but they appear in the Record filed herewith (R. 241).

The verdict and judgment in the trial court (R. 9), and the order and remittitur following judgment (R. 11) have not yet been reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 15, 1952 (R. 248). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

The respondent, a flagman employed by the petitioner, while riding in the caboose of a freight train, which was equipped with a power brake system which gave the *engineer* the control of the train required by the Safety Appliance Act, was injured by the sudden stopping of the train when the *conductor* applied the emergency air brake from the caboose when he observed smoke from a "hot box" on one of the cars.

The questions are whether the District Court erred,

(1) In leaving to the jury any issue predicated on a violation of the Safety Appliance Act; and

(2) In instructing the jury, under the above circumstances, that if they found that the brakes failed to function "efficiently" when applied by the conductor from the rear of the train, such failure constituted a violation of the Safety Appliance Act and thereby fastened absolute liability on the defendant railroad company.

STATUTES INVOLVED.

Safety Appliance Act.

§ 1. *Driving-wheel brakes and appliances for operating train-brake system.* It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use

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on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose (Act of March 2, 1893, ch. 196, § 1, 27 Stat. 531; 45 U.S.C. § 1).*

Federal Employers' Liability Act.

§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence, definition of employees.* Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

* * * * * * * * *

---

* Section 9 of the Safety Appliance Act and Regulations of the Interstate Commerce Commission define what constitutes a "sufficient number of cars" under above Section 1, about which no question has been raised in this case; and other Sections of the Safety Appliance Act refer to automatic couplers, grab irons, hand brakes and other appliances not involved in this appeal.

(Act of April 22, 1908, ch. 149, § 1, 35 Stat. 65; amended August 11, 1939, ch. 685, § 1, 53 Stat. 1404; 45 U.S.C. § 51.)

§ 53. *Contributory negligence; diminution of damages.* In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (Act of Apr. 22, 1908, c. 149, § 3, 35 Stat. 66; 45 U.S.C. § 53.)

The phrase at the end of Section 53, relating to the defense of contributory negligence, is repeated at the end of Section 54 relating to the defense of assumed risks.

STATEMENT OF THE CASE.

1. The Facts.

This action was instituted in the United States District Court for the District of Columbia by Thomas M. Brooks, respondent, hereinafter called the "plaintiff," against the Richmond, Fredericksburg and Potomac Railroad Company, petitioner, sometimes hereinafter called "defendant" and sometimes called "RF&P", to recover damages on account of personal injuries sustained by plaintiff, a flagman, who was riding in the caboose of a freight train. The majority opinion by the Court of Appeals for the District of Columbia Circuit succinctly states the facts of the case and petitioner takes the liberty of quoting the following factual statement from the opinion below:

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"The train was en route from Richmond to the vicinity of Washington. It was composed of about one hundred and twelve cars. Its locomotion was supplied by four diesel units. When well along the way and traveling about 50 miles an hour smoke and some fire were observed by crewmen coming from beneath a car near the middle of the train. The engineer was signalled that the cause was a hot box. If it was, there was evidence that company rules required the train to be brought to an immediate stop to avoid the wringing off of an anxle with possible derailment or other serious consequences. The engineer, however, due in part to the color of the smoke, thought the trouble was a sticking brake. He accordingly applied and then released the air brakes, which was a method of remedying a sticking brake. This first slowed down the train to a speed of approximately 20 to 25 miles per hour, but after the brakes were released the speed gradually increased. The pressure in the air brake system was reduced by this operation.

"Meanwhile the conductor in charge of the train, who was in the caboose with plaintiff, had also noticed the smoke and correctly concluded it was due to a hot box. The train-brake system, as well as being subject to control by the engineer was equipped with a valve in the caboose for use by the conductor in an emergency. He decided to apply the brakes by this means but when preparing to do so the train began to slow down because of the action of the engineer already described, which led the conductor to believe the engineer was stopping the train. When the train then began to gather speed, however, the conductor concluded the engineer had in fact not observed the smoke. He thereupon applied the brake system by opening a valve attached to the rear of the caboose. The result was the rough stop which threw plaintiff, an employee of defendant, to the floor." (R. 242.)

The District Court found (R. 237) and the Court of Appeals agreed (R. 245) that there was no dispute that the locomotive was *equipped* with power or train brakes as required by Section 1 of the Safety Appliances Act. A car with a defective brake was removed from the train before

it left Richmond, but otherwise, during inspections made before and after the accident, *no defects* were discovered in any of the braking equipment of the train (R. 200-205, 222-223).

Furthermore, the engineer made three or four brake applications on the train prior to the accident (R. 99) and various applications after the accident on the way to Washington (R. 104). Although there was some conflict between the testimony of the engineer and of the front brakeman as to the air pressure on the air brake line at the time the train left Richmond, and also immediately before the stop in question (R. 74, 90, 100, 109), there was no controversy whatever as to the fact that the brakes, when operated by the *engineer* on the locomotive, *functioned in the normal and customary manner at all times* during the course of the trip from Richmond to Washington, and no rough stops occurred, other than the emergency one in question, which occurred when the conductor applied the brakes by opening the emergency valve in the caboose.

2. Proceedings Below.

At the close of all the evidence, the trial court overruled the defendant's motion for a directed verdict and submitted the case to the jury on the following two of the four grounds which the plaintiff had alleged in his complaint: (1) whether the engineer was negligent in failing to stop the train when he saw smoke and, if so, whether his negligence was the proximate cause of the accident, and (2) whether the defendant had violated the Safety Appliance Act (R. 238).

On the latter issue, the District Court instructed the jury that there was no dispute that defendant's locomotive and a sufficient number of its cars were equipped as required by the Act (R. 237). However, the District Court further instructed the jury that the law also required that "the train brakes must operate efficiently" (R. 237), and that if they found that the air brakes failed to function

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"efficiently at the time of the accident *although applied in a normal, usual and customary manner by the conductor from the caboose by the control of the conductor's valve,* then said failure fastens liability on the defendant, irrespective of whether the defendant was negligent or not" (R. 238, 7). (Emphasis supplied)

The jury returned a general verdict for the plaintiff in the amount of $75,000 without specifying on which of the two issues they had based their verdict (R. 9). On the defendant's motion for a new trial the District Court ruled that the motion would be granted unless the plaintiff filed a remittitur of $25,000, and the remittitur was filed by the plaintiff (R. 11).

The defendant appealed to the United States Court of Appeals for the District of Columbia Circuit and on May 15, 1952, that Court affirmed the judgment of the District Court (R. 247).

One of the judges of the Court of Appeals (Judge Edgerton) was of the opinion that it was unnecessary to review the question of the applicability of the Safety Appliance Act when the brakes are applied by the conductor from the rear and he concurred in affirmance, but did not concur in the part of the opinion which reviewed the applicability of the Safety Appliance Act. The other two judges agreed that that question should be reviewed, but were divided in their decision. Therefore, there was no majority holding of the Court of Appeals on the precise question here presented with respect to the application of the brakes from the rear. The author of the majority opinion admitted that the "precise question presented is one of first impression" (R. 246), and concluded that "A fair reading of the statute in the light of its purpose, and as it has been construed in *Myers* v. *Reading Co.*, [331 U.S. 477 (1947)], *supra*, required that the train-brake system function efficiently not merely in or from the engine . . ." (R. 245). The dissenting judge wrote no opinion. With respect to petitioner's contention that the Act does not require the "efficiency" test under the circumstances here presented,

two of the three judges below combined to reject that contention.*

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred in affirming the District Court's erroneous action:

1. In submitting to the jury any issue predicated on a violation of the Safety Appliance Act (R. 238); and

2. In granting plaintiff's prayer No. 1 (R. 7) and in instructing the jury orally that, even though the train was equipped with air brakes which gave the *engineer* the control of the train required by the Safety Appliance Act, if the jury found that the brakes failed to function "efficiently" when applied by the *conductor* from the rear of the train, such failure constituted a violation of the Safety Appliance Act, thereby fastening liability on the Railroad Company, irrespective of whether the Company was negligent (R. 238).

REASONS FOR GRANTING THE WRIT.

1. The Precise Question Presented is One of the First Impression and was not Authoritatively Decided by the Court of Appeals Below.

Neither party to this action has found any reported cases in which the issue, with respect to operation of the brakes from the rear of the train, presented by this petition has been raised. The author of the majority opinion below stated that "the precise question presented is one of first impression" (R. 246). It would seem obvious that the is-

* The majority of the court below overruled defendant's contention that the District Court erred in refusing to rule as a matter of law that the plaintiff failed to prove that the alleged negligence of the engineer was the proximate cause of the accident. For the purpose of emphasizing the questions above, with their more far-reaching impact on the operations of railroads under the provisions of the Safety Appliance Act, defendant does not argue here the holding of the court below on proximate cause.

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sue now raised on the proper interpretation of the Safety Appliance Act is one of great importance measured simply by the number of railroads and the number of trains daily operating in interstate commerce with similar braking systems and mechanisms.

Certainly, both the District Court and the author of the majority opinion in the Court of Appeals have recognized that their interpretation of the Safety Appliance Act extends the coverage of the Act beyond the plain, specific words employed by Congress. Liability without regard to proof of negligence has been imposed by Congress on railroads only in the few sections of the Safety Appliance Act. Beyond those specific requirements the railroads, like all others, are liable only for negligence. The significance of the specificity of the requirements of the Safety Appliance Act is obvious. The author of the majority opinion in the Court of Appeals favored extension of the coverage of the Act based on his ideas of "the policy and spirit of the law" (R. 245), and stated that such extension gave effect to the "Congressional purpose" (R. 246).

Petitioner denies that the words here used by Congress are susceptible of construction beyond their plain meaning. Certainly, since the long-standing language has been weighed and considered by the Court below against a policy or spirit claimed to be contrary to the plain meaning of the words, such a decision should be reviewed by this Court. The fact that the question has never before been presented and the fact that the Court of Appeals by virtue of a three-fold split has left the question discussed but not decided, climaxes the need for decision by this Court.

The limits of the language of other sections of the Safety Appliance Act have, in recent years, warranted scrutiny by this Court. See *Myers* v. *Reading Co.*, 331 U.S. 477 (1947). In *O'Donnell* v. *Elgin, J. & E. R. Co.*, 338 U.S. 384 (1949), this Court was confronted with alternative contentions as to the proper interpretation of Section 2 of the Safety Appliance Act (27 Stat. 531, 45 U.S.C. § 2), the section which

requires that cars be equipped "with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." In that case a majority of this Court rejected the particular literal reading of Section 2 there contended for but not until the entire question was carefully reviewed and the dissenting views expressed. See also *Affolder* v. *N. Y. C. & St. L. R. Co.*, 339 U.S. 96 (1950).

On the basis of the above decisions it is submitted that the instant case, admittedly involving a novel question and now admittedly resting on an interpretation of an important Federal statute which frankly rejects the actual wording of the statute in favor of an alleged contrary policy, most surely calls for clarification by this Court.

2. Coray v. Southern Pacific Co. is not Controlling.

The author of the majority opinion in the Court of Appeals said that his interpretation of the Act

> "seems to conform with the approach of the Supreme Court as evidenced, for example, by *Coray* v. *Southern Pacific Co.*, 335 U.S. 520 (1949), where a narrow construction of the Act was avoided." (R. 246-7.)

The petitioner can not agree with this statement. To be sure, *Coray* held that

> "* * * This Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of *congressionally prohibited defective appliances* . . ." (335 U.S. at pp. 522-23) (Emphasis supplied)

However, the precise point of petitioner is that the instant case, as distinguished from the *Coray* case, involves no situation legislated on by Congress. The *Coray* case involved *admittedly defective equipment* which deprived the *engineer on the locomotive* of his ability to control the train. The accident in the instant case grew out of no defect which affected the control by the engineer; it resulted

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from the use of an emergency device supplied by the railroad for the safety of its employees *over and above the requirements of the Safety Appliance Act.* It is most earnestly submitted that no policy nor spirit of the law imposes absolute liability without regard for negligence under such conditions.

3. The Trial Court's Submission to the Jury of Any Issue Under the Safety Appliance Act was Erroneous.

The sole requirement of Section 1 of the Safety Appliance Act is that the locomotive engine shall be equipped with a power driving-wheel brake and appliances for operating the train-brake system, and that each train shall have a sufficient number of cars in it so equipped with power or train brakes that the *engineer on the locomotive* can control its speed, without requiring brakeman to use the common hand brake for that purpose.

While the decisions have made it clear that "equipped" within the meaning of the statute requires that such equipment be not defective, there is no requirement in the Act that trains should be equipped with a braking mechanism which would give the *conductor* control of the train *from the rear thereof.* Congress might have so legislated, but it did not do so.

The only evidence in the record is that the train in question was equipped in accordance with the statute and that both immediately before and after the accident in question the engineer was able to control and did control perfectly the speed of the train. There is absolutely no evidence from which either a court or a jury could infer that the train was not equipped with power brakes which enabled the *engineer on the locomotive* to control the train at all times. (R. 99, 104, 236, 237.)

4. The Trial Court's Instruction to the Jury on the Question of the Efficiency of the Air Brakes was Erroneous.

Plaintiff's Prayer No. 1 was erroneously granted and read to the jury as an instruction from the Court in the following words:

> "The Court instructs the Jury that if they find from the evidence that the accident was proximately caused, in whole or in part, by the failure of the air brakes to function efficiently at the time of the accident, although applied in a normal, usual and customary manner by the conductor from the caboose, by use of the conductor's valve, that if they so find, then said failure fastens liability on the Defendant, irrespective of whether the Defendant was negligent or not" (R. 7).

The theory of such an instruction is doubly erroneous.

In the first place, as pointed out above, no section of the Safety Appliance Act requires any mechanism for braking the train from the rear.

In the second place, while the decisions construing the Safety Appliance Act leave no doubt that the word "equipped" must be construed to mean that the specified equipment be not defective, the Safety Appliance Act requires only one specific appliance to be "efficient". Section 11 of the Act (36 Stat. 298, 45 U.S.C. § 11), dealing with various safety appliances, specifically provides that "All cars must be equipped with . . . *efficient hand brakes.*" (Italics added.) Such wording is significantly lacking from the *air brake* section of the statute. In like manner, Section 2 of the Act (27 Stat. 531, 45 U.S.C. § 2), dealing with automatic couplers, specifically requires that the couplings couple automatically by impact. Ladders handholds and grab irons are required to be *secure* (Sec. 11, *supra*). Again no such particularization appears in Section 1, the air brake section.

Accordingly, it is the earnest contention of the defendant that, under no circumstances, can the duty of the railroad to provide air brake equipment require more than that such

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brakes be not defective. Obviously, the word of art, "efficient," carefully selected for use in Section 11, carries on its face, and particularly to a jury, an implication of a much higher duty than was actually imposed by Section 1 of the Act.

The decisions of this Court have never been concerned with this precise point. The author of the majority opinion in the Court of Appeals referred to the case of *Myers* v. *Reading Co.*, 331 U.S. 477 (1947), as support for his rejection of the railroad's objection to the use of the word "efficient." However, that case was concerned only with Section 11 of the Safety Appliance Act which, of course requires cars to be equipped with "*efficient* hand brakes; . . ." In the case of *Affolder* v. *N. Y. C. & St. L. R. Co., supra,* relied on by the author of the majority opinion in the Court of Appeals, the *railroad* contended that the test under Section 2, the automatic coupler section of the Safety Appliance Act, was whether the cars were equipped with "efficient couplers" instead of couplers which "in fact failed to couple." The rejection by this Court of the contention of the railroad is obviously not dispositive of the question here presented.

On the other hand, the distinction between "efficient" and "non defective" is clearly brought out in the case of *Thayer* v. *Denver & R. G. R. Co.*, 25 N. M. 559, 185 Pac. 542 (1919), *subsequent appeal on different ground*, 28 N. M. 5, 205 Pac. 733 (1922), where it was held that even a finding by a jury, in answer to a special interrogatory, that the hand brake rigging on the car in question was not in any manner defective would not be equivalent to a finding that the car was equipped with an "efficient" hand brake. While the absence of the defects is the test imposed by other sections of the Safety Appliance Act, the court held in accordance with what is obvious on the face of Section 11, that that section imposed a requirement over and above a mere absence of defects. The court pointed out (185 Pacific 545):

> "It will be noted that 'defective' is not used [in the interrogatory] as the antonym of 'efficient', *and no lexicographers, so far as we know, so use it.* It is true, there are cases which imply that 'defective' is synonymous with 'inefficient' (*Geloneck* v. *Dean Steam Pump Co.*, 165 Mass. 202, 43 N. E. 85; *Kansas City, M. & B. R. R. Co.* v. *Burton*, 97 Ala. 240, 12 South. 88. And the Supreme Court of the United States has used the word 'defective' in speaking of a coupler which failed to work (*San Antonio, etc. R. R. Co.* v. *Wagner*, 241 U. S. 476, 36 Sup. Ct. 626, 60 L. Ed. 1110), *and of air brakes which failed to function* (*Spokane, etc. R. R. Co.* v. *Campbell* 241 U. S. 503, 36 Sup. Ct. 683, 60 L. Ed. 1125), and of ladders which were insecure (*Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874); *but in each case the language of the Safety Appliance Act was different, and there was no point made, as here, that a hand brake might be inefficient, and not necessarily defective.*" (Italics added)

See also *Spokane & Inland R. R. Co.* v. *Campbell*, 241 U. S. 497 (1916).

We find no close support in any decisions for the extension of the specifically chosen wording of Section 11 to the long-established wording of Section 1.

Accordingly, it is submitted that the District Court erred in submitting to the jury the question of the "*efficiency*" of the mechanism for braking the train *from the rear* and by not ruling as matter of law that there was no violation of the Safety Appliance Act.

Clearly, an improper issue was presented to the jury, and if either of the two issues submitted to the jury was incorrect, the defendant is entitled to a new trial. *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574 (1945); *Christian* v. *Boston & M. R. R. Co.*, 109 Fed. 2d 103 (CCA 2 1940); *Baltimore & O. R. Co.* v. *Reeves*, 10 Fed. 2d 329 (CCA 6 1926).

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CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1951

No. 171

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a corporation, *Petitioner,*

v.

THOMAS M. BROOKS, *Respondent.*

REPLY BRIEF OF PETITIONER.

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October Term, 1951

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RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a corporation, *Petitioner*,

v.

THOMAS M. BROOKS, *Respondent*.

REPLY BRIEF OF PETITIONER.

Respondent in his brief places primary emphasis on his complaint as to the sufficiency of petitioner's objections to certain instructions. It is unnecessary to review petitioner's counter-arguments in the court below. This Court has so recently considered an identical point that further citation of authority seems unnecessary. In the last paragraph of the recent case of *O'Donnell* v. *Elgin, J. & E. R. Co.*, 338 U. S. 384 (1949), quoted from at length in respondent's brief, it was said at page 394:

> "Criticism is made that petitioner's requests to charge were not sufficiently specific. That they were somewhat general in statement and were cast in terms

of a negligence case is true. *But the Court of Appeals found these requests sufficiently specific and pertinent to the issues to present the question which it decided. And in deciding this question the way it did, we believe it has fallen into error . . .*" (Emphasis added)

There, as here, an important issue under the Safety Appliance Act had been raised and considered by the court below. For the reasons already assigned in the Petition, it is submitted that review of the decision by this Court is necessary.

Respectfully submitted,

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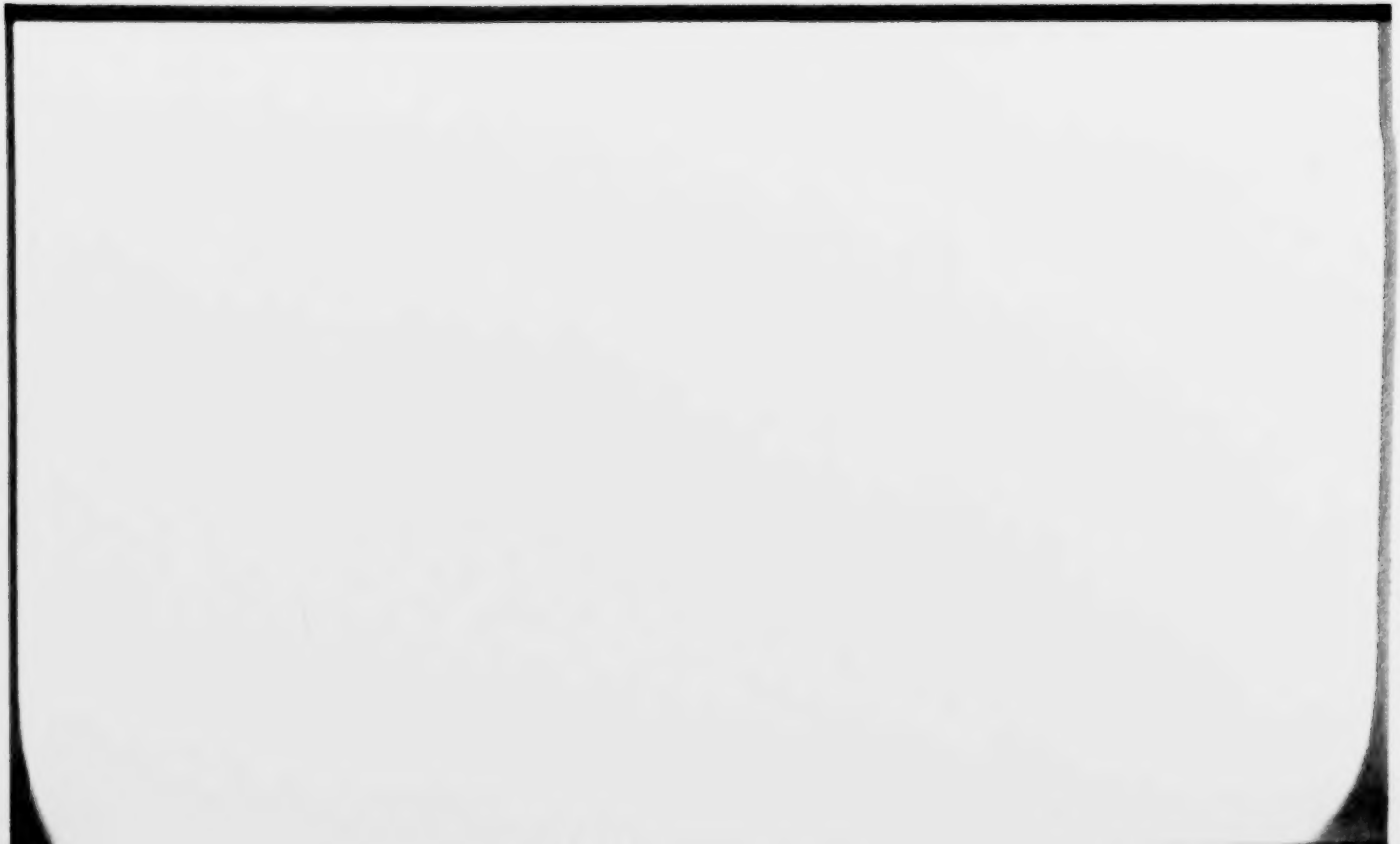

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OCTOBER TERM, 1952.

No. 171.

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a Corporation, *Petitioner*,

v.

THOMAS M. BROOKS, *Respondent*.

BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

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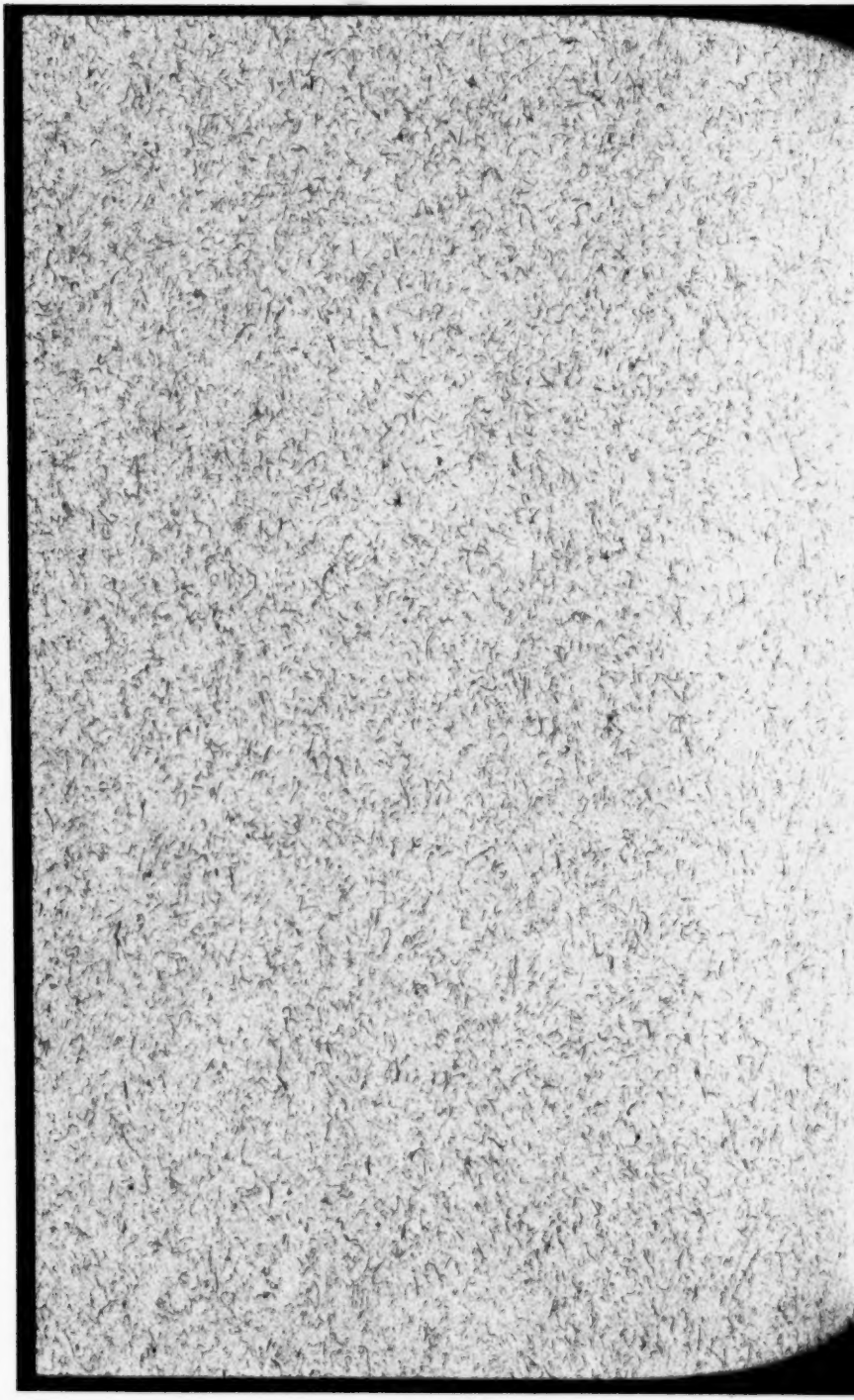

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 171.

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a Corporation, *Petitioner,*

v.

THOMAS M. BROOKS, *Respondent.*

BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

REASONS FOR DENIAL OF WRIT.

1. Petitioner's Failure to Request an Instruction Limiting the Applicability of Section 1 of the Safety Appliance Act to the Engineer Alone, or, to Object to the Trial Court's Instruction as to Application of the Air Brakes by the Conductor, Precludes A Claim of Error on Appeal. Rule 51, Fed. Rules Civil Procedure.

The Petitioner, on appeal, for the first time, sought to limit the application of Section 1 of the Safety Appliance Act, relating to air brakes, to use by the engineer. Having failed to raise this, pursuant to Rule 51, Federal Rules Civil Procedure, 28 U. S. C. A., by timely objection to the granting of Plaintiff's Prayer for Instruction No. 1, or, objection at the conclusion of the Court's charge, and, par-

ticularly, where the Petitioner did not offer any request for an instruction attempting to limit Section 1 in the manner it now seeks, this afterthought comes too late.

The Bill of Complaint (R. 2), filed November 7, 1950, brought under the Federal Employers' Liability Act and the Safety Appliance Act (Paragraph Second), alleged the Plaintiff's injuries were due to a violent stop when the conductor applied the brakes from the caboose (Paragraph Eighth, R. 3), because of the inefficiency of said air brakes (Paragraph Ninth (c), R. 3, 4). The Petitioner admitted the train was stopped by the conductor by applying the brakes from the caboose (Answer, Paragraph 8, R. 5), but denied liability generally under the Federal Employers' Liability Act and the Safety Appliance Act, setting up special defenses of sole and contributory negligence on the part of the Plaintiff (R. 6).

On June 5, 1951, at the pre-trial conference, it was stated (R. 6):

> "The contentions of the parties are concisely but adequately set forth in the Complaint and Answer."

This was signed by the attorneys for both parties (R. 7).

At a discussion with the Trial Court and Counsel for the Petitioner and Respondent, before any testimony was taken, for the purpose of apprising the Court of the basis of the Respondent's claim as well as points of defense, Petitioner's counsel made the following statement (R. 13):

> "I think there is a difference between the requirements of this Section and the requirements under the hand brake section where the statute itself actually says it shall be equipped with an efficient hand brake, but, for all intents and purposes, we admit that the brakes with which the train is equipped must be in good and proper working order to satisfy the requirements of the statute."

Testimony produced by the Respondent, relating to the Safety Appliance Act, was limited to those facts deemed

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necessary to prove its case under Section 1, based on the interpretation of the Act by both counsel. It is assumed the Trial Court's rulings were made in the light of the understanding by both counsel and the Court.

No where during the entire course of the trial did the Petitioner attempt to make the limitation it now seeks—had it done so, the Respondent could have offered evidence to show that the two conductor's valves (R. 74) are used constantly for the stopping of trains and are standard equipment on cabooses; that all freight cars have one angle cock on each end (which are frequently used to stop trains on movements where cars are being pushed and the engineer cannot see the leading car), and therefore, there were 224 angle cocks on this particular train, any one of which could have been used to operate the air brake system and stop the train. It might also have been shown that every passenger coach now in use, has a conductor's valve operated by a cord which is used by the conductor to stop the train by means of the air brakes.

It is not believed the failure of counsel for either party to find cases where this precise question before the Court has been decided, is a coincidence, but the recognition that no such narrow construction was intended or would be permitted by the Courts. Apparently, numerous counsel for the Petitioner shared in this belief until they filed their Brief on Appeal.

In *Palmer* v. *Hoffman*, 318 U. S. 109, 63 S. Ct. 477 (1943), the Supreme Court, speaking through Mr. Justice Douglas, at page 483, said:

> "* * * In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

The Appellate Court, through Judge Fahy, (R. 246) said:

> "As indicated, no such objection was specified below, and accordingly, it might well be argued, under Rule 51 of the Fed. R. Civ. P., that review of this alleged error is not available to appellant. See Palmer v. Hoffman, 318 U. S. 109 (1943); Frasca v. Howell, 87 U. S. App. D. C. 52, 182 F. 2d 703, 704 (1950); Ersler v. T. F. Schneider Corp., 88 U. S. App. D. C. 371, 188 F. 2d 1022 (1951). But the importance to the law of the case of an accurate instruction on the Safety Appliance Act leads a majority of the Court to scrutinize the instruction given for possible error. Montgomery v. Virginia Stage Lines, — U. S. App. D. C. —, 191 F. 2d 770 (1951).

See also Federal Practice and Procedure, Barron and Holtzoff, (1950) Rule 51, Section 1103, page 797.

The Petitioner preserved its right to object to the Trial Court's instruction on the ground "efficiency" rather than "defective" was used, but, beyond this, it cannot go.

2. Even had Petitioner Complied with Rule 51, Federal Rules Civil Procedure, the Trial Court Could Not Have Precluded the Jury from Considering a Violation of the Safety Appliance Act, When the Air Brakes were Operated by the Conductor from the Caboose.

Because of the preliminary question raised under Rule 51, Federal Rules Civil Procedure, the Respondent feels it will not be necessary for the Court to consider the Petitioner's principal contention under this heading, viz: air brakes do not have to operate safely for anyone but the engineer. Should the Court, however, wish to consider this matter, it will be found the wording of Section 1, its historical background, the purpose and intent of Congress, and the construction placed upon the Safety Appliance Act by this Court, conclusively negative the Petitioner's restrictive construction.

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An analysis of Section 1, shows it to be divided into two parts:

> "It shall be unlawful for any common carrier engaged in Interstate Commerce by railroad, to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake *and appliances for operating the train brake system,* OR to run any train in said traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on a locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose." (Italics supplied.)

The first part requires a power driving wheel brake and appliances for operating the *train brake system,* and, the second part requires a sufficient number of cars in a train equipped with power or train brakes, to enable the engineer to control its speed without requiring the brakeman to use the hand brake.

As to the first part, if a locomotive is being used in moving "interstate traffic", it can only mean, being used in furnishing motive power for the movement of cars. "Appliances for operating the train brake system" cannot be limited to the locomotive engine alone, for the reason that each and every part of the train brake system fits together in an inseparable pattern, which can only function as an integrated apparatus. If the triple valve on a car is bad, the train brake system will not function properly, whether it be the triple valve on the car next to the engine or on the 100th car (R. 94 and 95); if there is an abnormal leakage in the train line, by which means air passes from the engine to the last car through pipes and hoses, sufficient air pressure cannot be maintained to operate the train brake system, "and would constitute an inefficient braking system" (R. 143); or, if there is a leak in any one of the conductor's valves in the caboose (part of the train line equipment, R. 110), it will affect the operation of the train brake system (R. 111).

The second requirement of Section 1 would be violated if the required percentage[1] of cars in a train were not equipped with power or train brakes to enable the engineer drawing such train to control its speed.

The first portion of Section 1 requires an engine moving an interstate train to have appliances for operating the *train brake system.* Limiting "appliances" to the engine alone, would lead to this absurd result—if the engine had proper compressors, valves, etc., which pump the air through the train, but, because of a leaky appliance in the train, is unable to build up sufficient pressure to operate the brake system, there could be no violation of the Act because the engine was properly equipped, even though its air could not be utilized because of a defective appliance in the train. This would also be true whether the brakes were operated by the engineer or not.

This anomalous result is avoided by the requirements of the Safety Appliance Act, divided by the words "and" and "or", which mean: the locomotive would have to have those requirements set forth; the cars in the train would have to have appliances to enable the engineer to utilize the compressed air supplied by the engine compressors in operating the brakes; that a sufficient number of cars (85% by I. C. C. regulation) would be required to be equipped with power or train brakes to enable the engineer to successfully utilize the requirements of the first part. Therefore, by recognizing the parts of Section 1 as imposing separate requirements, the literal language of Section 1 is utilized in enunciating Congressional intent.

---

[1] I. C. C. Regulation, June 6, 1910: It is ordered, That on and after Sept. 1, 1910, on all railroads used in interstate commerce, whenever, as required by the safety appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power brake cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated.

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The framers of Section 1 used the word "and" betwe
that part requiring power driving wheel brake and th
part requiring appliances for operating the train-bra
system. The use of the word "and" had one purpose
that, of making separate requirements. After the portio
requiring appliances, they used the word "or" and follo
ing this, a requirement which relates to the percentage
cars necessary to be equipped with power or train brak
to enable the engineer to control the speed by the use
air brakes. The use of the word "or" was deliberate, wi
the obvious intent of making a failure to observe either
the requirements of Section 1 an unlawful act.

If it were felt the parts of Section 1 were inseparabl
an unintended result would occur by adhering to the liter
language. The air brake system would be outside of th
Safety Appliance Act, when, for instance, the engine, in
stead of "drawing" the train, was "pushing" the train
The same result would occur if the fireman was operatin
the locomotive (as he is required to do in order to qualif
for an engineer), or, if a hostler (who habitually move
engines in the yard) would be operating the engine, be
cause he would not be the locomotive engineer.

Since no other Section of the Safety Appliance Act re
lates to the operation of air brakes, it could hardly be con
tended that Section 1 was not intended to be inclusive.

The Interstate Commerce Regulations, supra, points ou
the Congressional intent, by stating:

> "• • • that to more fully secure the objects of the ac
> to promote the safety of employees and travelers o
> railroads, the minimum percentage of power brak
> cars to be used in trains, as established by its orde
> of Nov. 15, 1905, should be further increased • • • ."

To the same effect is the case of *Coray* v. *Southern Pac*
Co., 335 U. S. 520, 69 S. Ct. 275 (1949), in which this Court
speaking through Mr. Justice Black, at p. 276, said:

> "• • • An abrupt or unexpected stop due to bad
> brakes might be equally dangerous to employees and

others as a failure to stop a train because of bad brakes. And this act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances."

There is no testimony that conductor's valves are not standard equipment on all cabooses. It is definitely a part of the *braking system* of the train. Every member of the crew has to be familiar with the operation of air brakes and use it every day (R. 37). The same air that is pumped into the train line by the compressors on the engine, passes all the way back to the caboose (R. 37). Any leakage in the conductor's valve on the caboose would be a leak in the brake system and would thereby prevent the engineer from getting proper pressure to apply the brakes (R. 111).

There is no evidence that these valves are supplied and used solely as an emergency device; in fact, they are usually referred to as *conductor's valves.* They are also used by the conductor or brakemen on reverse movements, and have a whistle so that the operator, whether it be a brakeman or conductor, can sound the whistle as the train is being shoved across a road crossing (R. 46). Could it be contended that, in such a reverse movement, when the engineer may not, because of the track curvature or obstructions, be able to see the leading or first car, the Safety Appliance Act does not require safe operation of the air brakes from the rear?

The function of conductor's valves becomes increasingly important in the light of surprising testimony that there is no means of communication between the engineer and the crew in the caboose and vice versa (R. 77). Where the crew in the cupola of the caboose observe an unusual condition, it being their duty to do so under existing rules (R. 3, 5), the only means the conductor and brakemen in the caboose have of doing something about a dangerous condition is the application of the brakes from the rear of the train by means of the conductor's valve.

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The Petitioner contends (P. 9) that the significance of the specificity of the requirements of the Safety Appliance Act is obvious, and denies that the words used by Congress are susceptible of a construction beyond their plain meaning. An examination of Section 1 of the Act shows no specification of the equipment required. There couldn't be, because the Act was passed in 1893, which was before most modern improvements to air brake equipment were available. Section 1, however, is as inclusive as can be, viz: "appliances for operating the train-brake system." What appliances are required is not specified, but these requirements would change with the advent of new equipment. It is difficult to follow a contention which has for its basis, the proposition that three conductor's valves in its caboose, cannot be part of the "appliances for operating the train brake system."

There can be little doubt that the case of *Coray* v. *Southern Pac. Co., supra,* is controlling in the present case. In that case, suit was brought in the Utah State Court under the Safety Appliance Act and Federal Employers' Liability Act for the decedent's death, when a motor car operated by him crashed into the rear of an 82 car freight train, both being operated in the same direction. The train unexpectedly stopped just before the crash, because the air in its brake line escaped and locked the brakes, due to the fact that threads on a *valve* were so badly worn that a nut became disconnected. As a result of the sudden stop, the motor car, which was several hundred feet in the rear of the freight train, crashed into it. The decedent, operating the motor car, did not apply the brakes, as he and another employee were looking back toward a block signal. The trial court directed a defendant's verdict, which was affirmed on appeal. The Supreme Court of the United States, in reversing, through Mr. Justice Black, at p. 276, said:

> "First. We cannot agree with the State Supreme Court's holding that although the railroad ran its

> train with defective brakes, it thereby 'violated no duty owing' to the decedent. That Court said that the object of the Safety Appliance Act 'insofar as the brakes might be concerned, is not to protect employees from standing, but from moving trains.' We do not view the Act's purpose so narrowly. It commands railroads not to run *trains* with defective brakes. An abrupt or unexpected stop due to bad brakes might be equally dangerous to employees and others as a failure to stop a train because of bad brakes. And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances." (Italics supplied).

The Petitioner (P. 10) attempts to distinguish *Coray* from the present case on the theory that the defective equipment deprived the engineer on the locomotive of his ability to control the train. The fact is, however, that in the *Coray* case, the stoppage of the train was not caused by the application of the brakes by the engineer, but, because of a defective *valve*, causing the air to leak out and creating an emergency stop without any overt act on the part of the engineer. In the instant case, a service or normal stop was intended, but because of the defective and inefficient braking system, a rough or emergency stop resulted.

3. Trial Court Did Not Err in Its Instruction to the Jury on the Question of the Efficiency of the Air Brakes.

The Petitioner now contends (P. 12) that the only requirement under Section 1 is that the specified equipment be *not defective* and that air brakes are not required to be efficient—the word "efficient" being a word of art used only in Section 11 of the Act, which requires efficient hand brakes. The Petitioner, in a discussion with the Trial Court, said, supra:

> "I think there is a difference between the requirements of this section and the requirements under the hand

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> brake section, where the statute itself actually says it shall be equipped with an efficient hand brake but, for all intents and purposes, we admit that the brakes with which the train is equipped must be in good and proper working order in order to satisfy the requirements of the statute.

If there was any difference between the requirement that the air brake system be free of defects and be in good and proper working order, and, the requirement that they be efficient, the Petitioner has not made this differnce known. Simply calling the word "efficient" a word of art does not make it an obscure or mystic term. The Supreme Court did not so regard it in the case of *Myers* v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334 (1947), where, through Mr. Justice Burton, at page 1338, it was said:

> " * * * Where a jury finds that there is a violation, it will be sustained if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance. *Efficient means adequate performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent, inadequate.*
>
> *The inefficiency of the brake in this case may have consisted of its defective condition or its defective functional operation* resulting, in either case, in its knocking from the brake platform an experienced railroad man attempting to tighten or set the brake in the customary manner described in his testimony." (Italics supplied.)

It would seem the *Myers* case, decided by the Supreme Court in 1947, is a sufficient reply to the Petitioner's citation of *Thayer* v. *Denver & R. G. R. Co.*, 25 N. M. 599, 185 Pac. 542 (1919).

Hand brakes are utilized principally when the cars are individually controlled and "to stabilize a car on the track

or siding" (R. 79). Yet, in this simple operation, Section 11 requires that hand brakes be efficient. Could it be said that Section 11, covering the operation of hand brakes, is more important than the effective control by air brakes of an entire train?

The Myers case is the last Supreme Court case and one of many which have uniformly held that one way of showing an inefficient brake is to show that it failed to function in the usual way when applied in the usual and customary manner. In the instant case, not only was the brake shown to be "inefficient" in that it did not operate in the manner intended when applied in the usual manner, as evidenced by the rough and violent stop, but the reasons for this failure were supplied by the Petitioner. Mr. Reid testified 80 pounds of air was required to operate the new diesel braking system and that he had 80 pounds when leaving Richmond (R. 109), whereas everyone else including the inspectors charged with the duty of seeing that the train line pressure was proper, thought only 70 pounds was required (R. 38, 90, 215) and Petitioner's engine inspection reports all show a 70 pound pressure reading. Mr. Florence, the front brakeman, testified that when leaving Richmond, they had a fraction less than sixty pounds of air on the diesel (R. 90); so, instead of the ten pounds below the required braking pressure, they had, in fact, twenty pounds less than the amount Mr. Reid said was required. Mr. Carlson, the Petitioner's expert, testified that abnormal brake pipe leakage would account for a differential between the front and rear and would cause a rough stop (R. 143, 144). It therefore appears the braking system was *inefficient and defective* when the train started out from Richmond, immediately following the so-called inspection.

The Petitioner contends that in like manner (R. 13) Section 2 of the Act, dealing with automatic couplers, specifically requires that the couplings couple automatically by impact; that ladders, handholds and grab-irons are re-

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quired by Section 11 to be secure, but that no such particularization appears in Section 1, the air brake section. In the case of *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 U. S. 384, 70 S. Ct. 200 (1949), the Court through Mr. Justice Jackson, at page 203, said:

> "A close and literal reading of the Safety Appliance Act, 45 U. S. C. Sec. 2, 45 U. S. C. A. Sec. 2, suggests that two functions only are required of couplers; that they couple automatically by impact and that they uncouple without requiring men to go between the ends of the cars.
>
> * * *
>
> We find it difficult to read the Safety Appliance Act to require that cars be equipped with appliances which couple automatically by impact and which may be released without going between the ends of cars, but which need not remain coupled in the meantime.
>
> * * *
>
> As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care were to be considered on the question of this liability."

The Supreme Court did not stop with a close and literal reading of the Safety Appliance Act, but interpreted the coupler section in light of congressional intent and obvious purpose.

Section 2 is construed to mean not only couplers which couple on impact, but also couplers which remain coupled and which will not unintentionally come uncoupled at any time, and, the fact that they may operate most of the time or be efficient most of the time is not enough. *Affolder* v. *New York, C. & St. L. R. Co.*, 339 U. S. 96, 70 S. Ct. 509 (1950), *Carter* v. *Atlanta & St. Andrews Bay Ry. Co.*, 338 U. S. 430, 70 St. Ct. 226 (1949). In the *Affolder* Case, Mr. Justice Clark, at page 510 says:

> "Nor do we think that any question regarding the normal *efficiency* of the couplers is involved in an action under the Safety Appliance Acts. As we said in O'Donnell v. Elgin, Joliet & Eastern R. Co. 1949, 338 U. S. 384, 70 S. Ct. 200, and the Carter case, 338 U. S. 430, 70 S. Ct. 226, the duty under the Acts is not based on the negligence of the carrier, but is an absolute one requiring performance "on the occasion in question." (Italics supplied.)

The term "efficiency" does not appear in Section 2; nevertheless in the *Affolder* case, the opinion states that even "normal efficiency" is not involved—meaning efficiency is required on all occassions and at all times.

The efficient operation of air brake equipment has become increasingly important as the length of trains increased. When Section 1 was passed in 1893, freight trains of over a dozen cars in length were a rarity. Since that time, with the new powerful diesels, they have increased tremendously in length. In the instant case, the train consisted of 112 cars, over a mile and a quarter in length (R. 77). The brakes of a train of this size are operated by the air supplied by compressors on the engine, which is pumped through the pipes and hoses, called a train line, and the same train line carrying the air operates the brakes on the first car as well as on the 112th car. It would be difficult to visualize anything more important in the control of a train of this length, moving at high speed, than air brakes which would operate properly and efficiently under all conditions, including operation from the rear.

The Petitioner apparently realizes that the case of *Myers* v. *Reading, supra,* disposes of its contention that the air brake system need not be efficient, and attempts to avoid the impact of that case by saying it was only concerned with Section 11, which uses the phrase "efficient" hand brakes; however, the opinion gives the definition of "efficient" as well as "inefficient" and does not limit it to the so-called word of art contained in Section 11.

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4. The Precise Questions Now Raised Were Authoritatively Decided by the Court of Appeals After Careful Analysis and Consideration.

The Petitioner contends that the precise question presented is one of first impression, by taking the first part of a sentence of the majority opinion, separating it from the remainder of the sentence, and using the part extracted as his first reason for granting the writ (P. 8)—the inference being that only superficial thought or reasoning was used in arriving at the opinion. It would seem that a sufficient answer to this, would be the reading of the entire sentence, as it appears on (R. 247-248), which is as follows:

> "While the precise question presented is one of first impression, this construction seems to conform with the approach of the Supreme Court as evidenced, for example, by Coray v. Southern Pacific Co., 335 U. S. 520 (1949) where a narrow construction of the Act was avoided. The Act is to be liberally construed in keeping with its purpose, Lilly v. Grand Trunk Co., 317 U. S. 481, 486 (1943), namely, to promote the safety of trains and of persons and property therein. N. Y. Central R. R. v. United States, 265 U. S. 41, 44-45 (1924)."

A study of the entire opinion shows it to be careful, scholarly and logical.

5. The Supreme Court has Granted Certiorari in Safety Appliance Cases Only Where the Decision of the Trial and Appellate Courts Restricted Its Application.

In *Myers* v. *Reading Co., supra,* Myers was injured as a result of being thrown off a car while applying a hand brake. The jury returned a verdict for Myers, which was set aside by the trial court and a verdict n.o.v. entered. This was affirmed by the Circuit Court of Appeals, 155 F. 2d, 523, which agreed with the conclusion of the District Court that the Plaintiff, as a matter of law, had failed to make out a case under the Statute. The Supreme Court, in reversing, through Mr. Justice Burton, at p. 1339, said:

"Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

In the case of *Coray* v. *Southern Pac. Co., supra,* involving air brakes, the Supreme Court, through Mr. Justice Black, at p. 276, said:

"We cannot agree with the State Supreme Court's holding that although the railroad ran its train with defective brakes it thereby 'violated no duty owing' to the decedent. That court said that the object of the Safety Appliance Act, 'insofar as brakes might be concerned, is not to protect employees from standing, but from moving trains.' The obvious importance of the restrictive interpretation given to the two federal Acts prompted us to grant certiorari."

In the case of *O'Donnell* v. *Elgin, J. & E. Ry. Co., supra,* where O'Donnell was killed as a result of cars breaking loose, the Court of Appeals sustained the refusal of the trial court to charge the jury that the breaking of the coupler was negligence per se. The Supreme Court, in reversing, through Mr. Justice Jackson, at p. 206, said:

"As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care were to be considered on the question of this liability."

In *Carter* v. *Atlanta & St. Andrews Bay Ry. Co., supra,* the petitioner was injured when he ran after a car which failed to couple, and, while on it, the car was struck by the balance of the train which came against it and coupled. The trial court granted a directed verdict on the ground the coupler worked previously and subsequently and that there was no proof of any defect, which was affirmed on appeal, on the theory that the failure to couple on the first

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impact was the remote and not the proximate cause of the plaintiff's injury. The Supreme Court, in reversing, through Mr. Justice Clark, at p. 229, said:

> "The fact that the coupler functioned properly on other occasions is immaterial."

In *Affolder* v. *New York, C. & St. L. R. Co., supra,* Affolder ran after a 'cut' of cars which failed to couple, falling under them and losing his leg in the attempt. The Petitioner claimed the failure of the cars to couple was a violation of the Safety Appliance Act, while the Respondent claimed the criterion was whether the cars were equipped with efficient couplers and not whether they failed to couple, and even if there was a violation, it was not the proximate cause. Judgment for the plaintiff was reversed on appeal. The Supreme Court in reversing, through Mr. Justice Clark, at p. 510, said:

> "We think the Court of Appeals erroneously concluded that the jury could find for the plaintiff only if it inferred 'bad condition of the couplers and consequent violation of defendant's statutory duty * * *. This was the same error the Court of Appeals for the Seventh Circuit made in O'Donnell, supra, in an opinion relied upon by respondent in the present case."

CONCLUSION.

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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